

WESTERN STATES WATER COUNCIL

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February 17, 2026

The Honorable Lee M. Zeldin
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460
zeldin.lee@epa.gov

The Honorable Jessica Kramer
Assistant Administrator, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
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Via [regulations.gov](https://www.regulations.gov) (email: cwa401@epa.gov) [Docket ID EPA-HQ-OW-2025-2929]

RE: Updating the Water Quality Certification Regulations

Dear Administrator Zeldin and Assistant Administrator Kramer:

The Western States Water Council (WSWC) is a bi-partisan government entity created by western governors in 1965 that represents seventeen states. Our members are appointed by, and serve at the pleasure of, their respective governors. WSWC's mission is to ensure the West has an adequate, secure, and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future. For 60 years, WSWC has been a continuous advocate for the rights of states to conserve and protect their water resources.

WSWC appreciates the opportunity to comment on EPA's proposed rule, "Updating the Water Quality Certification Regulations." We also appreciate EPA's efforts to gather input from states—including through the pre-proposal docket, stakeholder meetings, and the cooperative federalism consultation process.

EXECUTIVE SUMMARY

Section 401 is a foundational element of cooperative federalism under the Clean Water Act (CWA). It provides states an essential safeguard to ensure federally licensed or permitted activities comply with state water quality protections. WSWC's member states have long exercised §401 authority responsibly, cooperatively, and in a timely manner when complete requests are presented for review.

WSWC supports efficient, predictable permitting for critical infrastructure and economic development, but not at the expense of state co-regulatory authority and water quality protection. In areas where member states hold differing views on specific regulatory approaches, WSWC urges EPA to give careful and substantial weight to the individual comments submitted by states as co-regulators—not merely stakeholders—and to continue meaningful engagement with states during finalization and implementation (including guidance).

Across our membership, WSWC expects broad alignment on several key themes:

1. **Federalism and state primacy:** The final rule should preserve and respect the breadth of state authority under the CWA, including the role of state law in implementing water quality requirements.
2. **Timely, workable process:** The final rule should recognize the statutory one-year review period, preserve workable completeness and information provisions, and avoid procedural changes that unintentionally increase denials or delays.
3. **States' ability to protect water quality over a project's lifecycle:** The final rule should preserve states' ability to place and enforce protective certification conditions and to modify certifications where needed to address material changes or new information relevant to water quality.
4. **Regulatory certainty:** EPA should minimize "regulatory whiplash" created by frequent, rapid changes to §401 regulations, which impose significant fiscal and administrative burdens on states and uncertainty on applicants.

I. STATE AUTHORITY AND FEDERALISM

EPA has characterized CWA §401 as authorizing a "specific and limited" role in the federal licensing or permitting process. However, Congress built the CWA on cooperative federalism and clearly recognized the inherent water quality protection authority of states. Section 101(b) declares: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution;" and §101(g) adds that the authority of the states to "allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act...".

Section 401(a) provides that any applicant for a federal license or permit to conduct any activity "which may result in any discharge into the navigable waters" must provide a certification from the state that "any such discharge will comply with the applicable provisions" of several CWA sections. Section 401(d) further provides that certifications "shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant...will comply" with those provisions "**and with any other appropriate requirement of State law.**" (emphasis added) Together, these provisions confirm the central co-regulatory role of states in protecting water quality and the importance of state law in implementing state water quality requirements.

The §401 certification process is an important tool for states to fulfill their responsibilities to conserve and protect their water resources, ensuring federally permitted projects comply with state water quality standards. As EPA considers input from co-regulator states and stakeholders, WSWC urges the agency to accommodate and support state certification processes and to retain appropriate deference to the diversity of state legal and programmatic frameworks.

II. STATE PROCESS, COMPLETENESS, AND CAPACITY

Each state has a unique legal and regulatory framework of water quality statutes, designated uses, water quality standards, and implementing procedures. States must consider requests for certification consistent with their own laws, procedures, and CWA obligations. Any conditions deemed necessary by a state to ensure compliance must be factored into the related federal license or permit.

WSWC's member states support the CWA's clear, statutory one-year limit for action on certification requests and agree it should not be abused through open-ended information requests and exchanges. In practice, the vast majority of §401 requests are processed well within one year when states receive a complete application. Where timelines extend, it is often due to incomplete submissions, changes to the project, unresponsiveness from applicants, or the special needs of large or complex projects. Incomplete requests are commonly denied without prejudice.

EPA should avoid revisions that inadvertently increase administrative burdens or force states into unnecessary denials when critical information is missing. Provisions that preserve states' ability to identify needed information relevant to water quality compliance can improve efficiency and certainty for applicants by reducing iterative, piecemeal information exchanges.

If EPA finalizes significant procedural revisions, WSWC urges the agency to provide an adequate implementation window so states can evaluate changes, update procedures and guidance, and implement in a manner consistent with state law and administrative requirements.

III. CRITICAL INFRASTRUCTURE AND STREAMLINED PERMITTING—WITH WATER QUALITY SAFEGUARDS

EPA has noted that critical mineral, energy, infrastructure, and development projects that are key to economic growth are often subject to state certifications under CWA §401. WSWC supports a balanced approach that recognizes both the need for streamlined permitting and the essential role of §401 as a water quality safeguard within cooperative federalism. Section 401 should remain focused on ensuring compliance with state water quality requirements and should not be implemented in ways that dilute water quality protections or undermine states' co-regulatory role.

Western states strongly support the development of critical infrastructure and efficient permitting processes, but not at the expense of states' authority to allocate, manage, and protect their water resources and water quality. WSWC urges EPA to continue working with states to streamline permitting processes, coordinate regulatory reviews, reduce duplicative procedures, and support timely completion and maintenance of vital infrastructure projects while appropriately protecting environmental resources.

IV. SCOPE OF CERTIFICATION AND WATER QUALITY PROTECTION (INCLUDING PROJECT-RELATED IMPACTS)

States assess whether a federally permitted or licensed activity will comply with state water quality requirements in the presence of point source discharges and, in many circumstances, where water quality may be impacted in ways closely associated with the project. WSWC encourages EPA to ensure the final rule preserves states' ability to protect water quality consistent with the CWA and state standards, while providing clarity and predictability for applicants.

WSWC recognizes the importance of clear statutory boundaries and the need to avoid using §401 to address issues beyond water quality requirements. At the same time, the final rule should not unintentionally constrain states from addressing water quality impacts that are integral to a project's compliance with state water quality standards.

V. NARRATIVE WATER QUALITY CRITERIA AND THE FULL SCOPE OF WATER QUALITY STANDARDS

EPA requested feedback on whether the definition of “water quality requirements” should be limited to only numeric water quality criteria. WSWC urges EPA not to limit certification review or certification conditions to numeric criteria alone.

Section 401 gives states the authority and obligation to ensure federally permitted projects comply with state water quality standards. Water quality standards include designated uses, numeric **and narrative** criteria, and antidegradation requirements. Therefore, states must retain the authority to protect all components of their water quality standards.

The importance of narrative criteria is illustrated by how states are addressing pollutants and conditions where numeric criteria may be incomplete, evolving, or not feasible for every parameter. For example, narrative criteria play a vital role in many states’ approaches to nutrient pollution and toxics, as well as other pollutant categories and site-specific water quality conditions.

In July 2024, the Council passed Position #517 – State Nutrient Reduction Strategies, in which our states agreed on the value of narrative criteria in meeting water quality-based goals. Under this position, the Council resolved to support “the ability of each State to choose how it leverages the portfolio of reduction strategies in determining nutrient reduction regulations, including narrative criteria, technology-based criteria, market-based efforts, state regulated alterations to the landscape, as well as long recognized strategies such as numeric criteria, TMDLs, facility optimization, and NPDES permitting.”

WSWC urges EPA to preserve flexibility for states to apply both numeric and narrative criteria and to defer to state comments and consultation to understand how best to respect the range of water-quality management strategies employed by state legislatures and water agencies.

VI. CERTIFICATION MODIFICATIONS

The ability to modify certifications after issuance is critical for states to meet their CWA and state responsibilities across a project’s lifecycle. To perform their duties, certifying authorities must be able to respond to material changes to the project, water quality standards, available technologies, new data indicating a risk to water quality, and other relevant developments.

WSWC urges EPA to consult with states regarding the modification process and to ensure that any final framework respects state primacy and responsibility as established under CWA §§101(b) and 101(g), §27 of the Federal Power Act, and the Supreme Court’s decision in *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*.

WSWC is concerned that elements of the proposed rule could create or expand a *de facto* veto over state modifications. While states support transparent processes and engagement with applicants, modification procedures should not erode state authority to protect water quality where new or changed information warrants adjustment of certification conditions.

VII. REGULATORY UNCERTAINTY AND IMPLEMENTATION

EPA seeks to address regulatory uncertainty. One significant source of uncertainty for both co-regulators and the regulated community has been substantial and recurring changes to regulatory definitions, policies, and programs between federal administrations. These shifts can lead to confusion, loss of state resources, and unnecessary delays.

WSWC invites EPA to continually seek feedback on how changes can be promulgated and implemented to minimize regulatory whiplash. WSWC supports changes that strengthen clarity and deference to state water laws and do not diminish primary state authority and responsibility over water resources and water quality. If EPA proceeds with revisions, it should provide sufficient time for states to implement program and guidance updates.

VIII. LANDS OF EXCLUSIVE FEDERAL JURISDICTION

EPA has identified certain national parks as “lands of exclusive federal jurisdiction.” As earlier promulgations have done, the proposed rule maintains that EPA is the §401 certifying authority in those parks. Prior to the 2023 rule and these designations, states responsibly exercised their certification authority in some of those parks for decades.

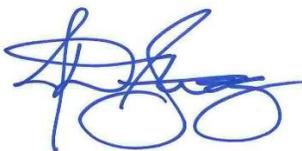
WSWC encourages EPA to consult with affected states regarding certifying authority in national parks designated as “lands of exclusive federal jurisdiction” to resolve any jurisdictional disputes in a manner that upholds the CWA’s direct grant of §401 certifying authority to states and its intent to empower states to protect water quality within their boundaries.

CONCLUSION

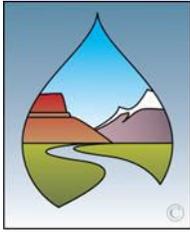
EPA should continue to engage states as true co-regulators throughout finalization and implementation of the §401 regulations. Any final rule should demonstrate meaningful integration of state perspectives through early and substantive consultation, respect the full range of state water quality strategies and implementing approaches, and give full weight to the individual comments submitted by states that are best positioned to assess local impacts.

We appreciate EPA’s consideration of these comments and look forward to continued collaboration to protect water quality across the West.

Sincerely,



J.D. Strong
Executive Director



**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of
STATE CWA SECTION 401 CERTIFICATION AUTHORITY**

**Lawrence, Kansas
October 23, 2024**

WHEREAS, States have responsibly exercised their delegated authority under the Clean Water Act (CWA) Section 401 and under state water quality statutes to protect water quality, and must consider proposed activities and discharges in light of the states’ designated water uses and related water quality standards; and

WHEREAS, the Council supports a balanced and integrated approach to achieve water and energy policy goals that plans for the future in sustainable ways, and recognizes legitimate state water and water quality management, protection and planning authorities to balance competing water uses; and

WHEREAS, the western states strongly support the planning and development of critical infrastructure and streamlined permitting processes, but such efforts should not come at the expense of states’ authority to allocate, manage, and protect their water resources; and

WHEREAS, the development of hydropower and other federally permitted and licensed projects involving activities that may impact states’ water quality standards should be appropriately undertaken in compliance with substantive and procedural state water law and delegated authority under CWA Section 401; and

WHEREAS, CWA Section 101(b) supports the states’ critical role in protecting water quality by stating: “It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution;” and

WHEREAS, CWA Section 101(g) further provides that the primary and exclusive authority of each state to “allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act”; and

WHEREAS, Section 27 of the Federal Power Act declares: “That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein;” and

WHEREAS, the Supreme Court has narrowly interpreted the Federal Power Act (16 U.S.C. 791a et seq.) reading Section 27 (16 U.S.C. 821) to limit state authority to set streamflow requirements on federally permitted and licensed projects, holding in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946) and in *California v. FERC*, 495 U.S. 490 (1990) that federal requirements preempted any state requirements, including efforts to establish minimum stream flows, noting that “...Congress remains free to alter what we have done;” and

WHEREAS, these rulings eroded state authority over state resources, and the Council has supported federal legislation to restore states’ primary authority for regulating streamflows and water use and clarifying Congressional intent under the Federal Power Act; and

WHEREAS, in *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), the Supreme Court upheld a state’s delegated authority to impose minimum stream flow conditions under

the CWA Section 401 certification process where necessary to protect a designated use for fish habitat, expressly rejecting any implied limitations on Section 401 certifications based on the *First Iowa* interpretation of the Federal Power Act; and

WHEREAS, an overly narrow reading of Section 401 would deprive the states of the ability to maintain the very beneficial uses that the Clean Water Act was designed to protect, and threaten the existing partnership between states and federal agencies based on cooperative federalism; and

WHEREAS, the vast majority of Section 401 certification requests are processed within 90 days, well within the one year allowed by current law, with relatively little if any backlog of certification actions; and

WHEREAS, most delays are typically due to submission of an incomplete application, applicants' non-responsiveness to requests for additional information, the completion of necessary study requirements, the size and complexity of some projects (and related impacts), substantive changes to the proposed project requiring further review, or constraints on state resources; and

WHEREAS, CWA Section 401 certification denials by states are rare and carefully considered, and are not examples of the failure of the system, as the process has been historically well-understood, reliable and supported by case law that provides certainty for both the states, federal agencies, and the regulated community; and

WHEREAS, actions taken by the federal government under the 2020 CWA Section 401 Certification Rule (85 FR 42210) caused some western states to issue an increased number of denials, due to inflexible deadlines that did not accommodate state public engagement laws or allow sufficient time to gather adequate information on project impacts; and

WHEREAS, the 2020 rule revision led to federal agencies waiving reopener conditions in nationwide permits imposed on federal projects by states under CWA Section 401, inconsistent with CWA Sections 101(b) and 101(g), Section 27 of the Federal Power Act, and the Supreme Court ruling under *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*; and

WHEREAS, EPA published a new 2023 CWA Section 401 Water Quality Certification Improvement Rule (88 FR 66558); and

WHEREAS, the 2023 CWA Section 401 Water Quality Certification Improvement Rule identified 16 national parks that EPA determined to be "lands of exclusive federal jurisdiction" and asserted that EPA is the Section 401 certifying authority in those parks, although states have been the certifying authority in some of those parks for decades; and

WHEREAS, substantial and recurring changes to regulatory definitions, policies, and programs between federal Administrations create uncertainty for co-regulators and the regulated community, often leading to unreliable results, indecision, inconsistency, and lawsuits.

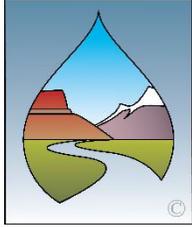
NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council supports any changes that strengthen the deference to state water laws and do not diminish the primary state authority and responsibility for the appropriation, allocation, development, conservation, and protection of their water resources, including minimum streamflows, and the protection of water quality and designated uses.

BE IT FURTHER RESOLVED that the Western States Water Council strongly supports early state engagement in federal permitting and licensing actions and the coordination of state and federal environmental requirements and review processes for critical infrastructure without diminishing state authority.

BE IT FURTHER RESOLVED that the Western States Water Council supports a mechanism in any rule development process for a representative number of states, as co-regulators with diverse perspectives and regions, to engage actively with EPA staff to provide direct and effective feedback on the implementability of a proposed rule.

BE IT FURTHER RESOLVED that the Western States Water Council encourages EPA to consult with affected states regarding EPA's certifying authority in national parks designated as "lands of exclusive federal jurisdiction" in order to resolve any jurisdictional disputes in a manner that upholds the CWA's direct grant of Section 401 certifying authority to states and its intent to empower states to protect water quality within their boundaries.

Revised and Readopted
(See Position No. 471, September 16, 2021 and No. 426, October 26, 2018)



RESOLUTION
of the
WESTERN STATES WATER COUNCIL
Regarding
STATE NUTRIENT REDUCTION STRATEGIES
West Fargo, North Dakota
July 26, 2024

WHEREAS, the Clean Water Act (CWA) establishes individual States as co-regulators, responsible for establishing comprehensive water quality standards and nutrient reduction strategies for waters within their borders; and

WHEREAS, the west includes diverse and unique physiographic, hydrologic, geologic and climatic conditions, and water supply infrastructure, with significant implications for nutrient management; and

WHEREAS, States are primarily responsible and accountable for their own water development, management, and protection challenges, and are in the best position to identify, evaluate, and prioritize their needs, and plan and implement strategies to meet those needs; and

WHEREAS, CWA Section 101(b) supports the states' critical role in protecting water quality by stating: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution;" and

WHEREAS, Congress established a national policy in CWA Section 101(a)(7) supporting the development and implementation of programs for the control of nonpoint sources of pollution "in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution;" and

WHEREAS, most States have authority over the regulation of discharges of pollutants, including excess nutrients, for waters within their borders, and are primarily responsible for managing and otherwise controlling such discharges; and

WHEREAS, nitrogen and phosphorus pollutants are the cause of water quality impairment to thousands of water bodies in the U.S., resulting in hypoxia, harmful algal blooms, and groundwater nitrate contamination, and thereby threatening the availability of water for designated uses including domestic supply, recreation, aquatic wildlife habitat, and agricultural use; and

WHEREAS, nutrient issues are typically the result of excess availability, manifesting as drinking water compliance problems and impacts to desirable aquatic life; and

WHEREAS, most States have unique reduction strategies based on narrative criteria, which express and address the impact of excess nutrients, and result in demonstrable positive environmental

responses that decrease the frequency, size, and severity of low dissolved oxygen occurrences and other water quality issues, including those caused by harmful algal blooms; and

WHEREAS, the Environmental Protection Agency (EPA) has promoted the position that numeric nutrient criteria are necessary to provide measurable water quality-based goals and are easier and more efficient than the narrative criteria statements in many state water quality standards; and

WHEREAS, nutrient reduction requires a combination of natural and social sciences to create and implement standards which are achievable, economically feasible and sociologically appropriate, and support desired outcomes for designated uses; and

WHEREAS, EPA provides information, methods, tools, evaluation techniques, and best practices to address problems associated with excess nutrients; and

WHEREAS, EPA seeks to support the efforts of states and tribes to reduce nutrient loading by facilitating water quality modeling and monitoring; and

WHEREAS, baseflow conditions can be predominantly influenced by wastewater from NPDES permitted facilities, and technology-based controls for point sources may be more physically and fiscally achievable than achieving water quality based effluent limitations; and

WHEREAS, reductions of wet weather nutrient loading require control efforts among both point and non-point sources in both urban and rural landscapes, and states have different approaches to controlling nonpoint sources, which are widespread, challenging to control and maintain, and largely subject to only voluntary authority under the Clean Water Act; and

WHEREAS, Congress has authorized funding for programs that are crucial to nutrient reduction such as Clean Water State Revolving Funds (Clean Water SRFs), Section 106 Grants for water pollution control programs, Section 319 Grants for nonpoint management programs, and National Resources Conservation Service (NRCS) programs such as the Environmental Quality Incentives Program (EQIP).

NOW, THEREFORE, BE IT RESOLVED, that any EPA nutrient reduction strategy must recognize and respect state primacy, reflect a true state-federal partnership, and provide adequate funding consistent with current federal statutory authorities and regulatory mandates.

BE IT FURTHER RESOLVED, the Western States Water Council (WSWC) supports the ability of each State to choose how it leverages the portfolio of reduction strategies in determining nutrient reduction regulations, including narrative criteria, technology-based criteria, market-based efforts, state regulated alterations to the landscape, as well as long recognized strategies such as numeric criteria, TMDLs, facility optimization, and NPDES permitting.

BE IT FURTHER RESOLVED, the WSWC supports the ability of each State to implement reduction strategies that focus on state-selected priorities, appropriate documentation and public outreach, and achievable improvement goals and that consider the severity of impairments, the impacts to drinking water, the need to protect unimpaired waterbodies, the implementation challenges and impacts to downstream waters as understood through both natural and social sciences.

BE IT FURTHER RESOLVED, that effective nutrient reduction requires engagement and coordination among all levels of government, each fulfilling their role in scientific investigation, technical and financial assistance, strategic prioritization, tactical regulation, resource delivery, on-site implementation, and adaptive management.

BE IT FURTHER RESOLVED, that the WSWC encourages the EPA to work with its federal partners such as NRCS to form a coordinated federal response with state input to support customized state nutrient reduction strategies and the achievement of water quality standards.

BE IT FURTHER RESOLVED, the WSWC supports funding at levels needed for states to fully implement federal programs that facilitate the development and implementation of science-backed state-led nutrient reduction strategies, including Clean Water SRFs, Section 319 & 106 grants, and NRCS programs such as EQIP.

BE IT FURTHER RESOLVED, the WSWC supports the collection, analysis, and open sharing of reliable water quality data at all levels of government to support sound decision-making, including development of models, tools, and resources that are adaptable to unique hydrologic conditions.